No. 97-1790-CSX Title: Michael Lawson and Edie Tucker, Petitioners
v.
Elrick Murray, et ux.

Docketed: May 5, 1998 Court: Superior Court of New Jersey, Appellate Division

Entry	Date	Proceedings and Orders
	May 4 1998	Petition for writ of certiorari filed. (Response due June 4, 1998)
	Jun 4 1998	Brief of respondents Elrick Murray and Belinda Murray in opposition filed.
	Jun 17 1998	DISTRIBUTED. September 28, 1998
	Jun 17 1998	Reply brief of petitioners Michael Lawson and Edie Tucker filed.
	Oct 5 1998	REDISTRIBUTED. October 9, 1998
	Oct 13 1998	REDISTRIBUTED. October 16, 1998
	Oct 19 1998	Petition DENIED. Concurring opinion by Scalia, J. (Detached opinion.)

****

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

RICHARD L. TAYLOR,

Petitioner,

vs.

CITY OF PONCA CITY, OKLAHOMA, *ex rel.* THE PONCA CITY POLICE DEPARTMENT and CHIEF RAYMOND HAM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the federal court err in granting summary judgment to the City and City Police Chief Ham thereby depriving police officer Taylor of his liberty and property without due process of law.

Did the federal court err by not granting plaintiff's Federal Rules of Civil Procedure Rule 56(f) motion when an obstruction of justice by city officials; and, a refusal by Ham to submit to a court-ordered deposition, prejudiced Taylor in his collection of evidence to be used to oppose the City's Motion for Summary Judgment.

PARTIES TO THE PROCEEDING

The parties identified in the caption are all the parties to this appeal. Police Chief Raymond Ham was the cross-appellant below, seeking protection from court-ordered discovery on the basis of sovereign immunity. Other parties, dismissed from the District Court proceedings, who are not parties to the appeal are Everette Van Hoesen, Bob Stieber, and Don Ray.

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Petitioner, Richard L. Taylor, ex-police officer for the City of Ponca City, respectfully requests that he be given a proper post-termination hearing on his termination from employment as a police officer and therefore a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported and not to be used as, ". . . [B]inding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." The opinion of the district court in *Taylor v. City of Ponca City, et al.*, United States District Court for the Western District of Oklahoma, CIV-95-1650-M is not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on December 30, 1997. No petition for rehearing was filed before the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging freedom of speech. . . ."

42 U.S.C.A. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

The fundamental question in this case is whether the termination of a police officer hired under and protected by a "just cause" collectively-bargained-for-employment, publicly accused of criminal behavior, entitles that officer to pre- and post-termination hearings pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Also at issue is

the City's refusal to provide the Chief of Police, Raymond Ham for deposition which prevented him from making a record in opposition to the City's Motion for Summary Judgment granted in its favor. To fully appreciate the significance of the issues presented by this case, it is essential to consider the facts surrounding Taylor's termination from employment with the City of Ponca City, the City's refusal to provide a fair pre-termination hearing and a full post-termination hearing and Ham's refusal to obey a court order to present himself for deposition in order for Taylor to adequately respond to the City's Motion for Summary Judgment, ultimately granted in its favor.

Taylor, terminated from public employment as a police officer, by his employer, appellee, Ponca City, Oklahoma and Police Chief Raymond Ham ("City"), stated a claim under I, V, and XIVth Am. U.S. Const. and 42 U.S.C.A. § 1983 for deprivation of property and liberty without due process of law when city employer wilfully terminated him without just cause; biased his pre-termination hearing; published false statements to the public that Taylor was guilty of manslaughter; failed, for over 16 months (and continuing), to provide a reasonably prompt post-termination hearing in accordance with the applicable collective bargaining agreement's requisite time periods; failed to notify Taylor of untimely filed motions seeking delay of post-termination hearing before the arbitrator; interfered with Taylor's union rights; refused to obey District Court's Orders regarding discovery; intimidated witnesses during discovery; stated policy of waiting until employee criminal trial concluded before complying with contract arbitration requirements setting post-termination hearing; and failed to reinstate him following "not guilty" verdict at the criminal trial.

Taylor was employed with the City of Ponca City Police Department ("PCPD") as a police officer from September 23, 1985 until his involuntary retirement ("termination") on

February 17, 1994, by PCPD Chief Raymond E. Ham ("Ham"). At all times relevant to this controversy Taylor was a Union member. The Union was recognized as the exclusive representative of the PCPD Police Officers under the *Agreement of Recognition Bargaining Procedure and Operating Contract between the City of Ponca City, Oklahoma and Fraternal Order of Police Lodge 103* effective the fiscal year 1993-1994 ("CBA", App. 41-80, Art. I[B]). The CBA contains a just cause termination clause (App. 44); and a mandatory and binding arbitration clause. (App. 64-70, Art. XXVII[B] [Step 5][d]).

Taylor was terminated pursuant to Policy No. 1.1.5a, Article 7 of the *PCPD Policies and Procedures Manual* ("Manual", App. 120-336), which states, to-wit:

> Any officer or employee whose actions or conduct are such as to cause him to be charged, bound over, indicted, or held to answer for any criminal matter, provided such charges are not frivolous and wholly without foundation, shall be subject to disciplinary action.

The Manual was written and published by Ham, with authority from the City. (App. 91).

The CBA supersedes the manual which superseded the City of Ponca City Personnel Policies and procedures Manual. (*See* App. 642 [Tr. p. 122]; App. 87; App. 120).

Taylor was terminated solely because of the filing of a felony charge of First Degree Manslaughter brought against him in Kay County, Oklahoma. Taylor was terminated solely because of the filing of a felony charge as that was the deciding difference between Taylor and past employment practices in the area of discipline for alcohol related traffic offenses and because at the

time of the termination Taylor had not yet been found guilty of any of the criminal offenses listed as the basis for the termination in the City Notices. (*See* App. 651 and 666).

The criminal charge arose out of the following facts. On December 18, 1993, Taylor was involved in a single car accident occurring in Kay County. The passenger riding with him died and Taylor was injured. Taylor was twice notified of impending disciplinary action. (App. 31).

Prior to suspension and due to his injuries from the accident Taylor sought sick leave as an entitlement under the CBA. (App. 31 and 32). On January 7, 1994 Taylor was placed on suspension *without* pay and his sick leave and court compensation time request was denied (App. 32). February 4, 1994, Taylor was notified to attend a February 14, 1994 Internal Board of Inquiry and Recommendation ("IBIR") hearing, the purpose of which was to review and recommend specific appropriate disciplinary action to be administered Taylor. (App. 31).

On the 14th day of February, 1994, PIEL was ordered by Ham to serve on the IBIR. As a member of the IBIR, PIEL was charged, along with two other officers, Asst. Chief Van Hoesen and Gary Ingmire, with administering Taylor's due process rights in the form of a pre-disciplinary hearing convened as a result of a felony charge brought against Taylor by the State of Oklahoma for the events described in paragraph 3 above. (App. 33 and 287, No. 52.1.3).

The IBIR is a body of officers organized pursuant to the Manual No. 52.1.3. (App. 287). Under this policy the officers comprising Taylor's IBIR were selected by Ham. The IBIR's stated purpose is to protect Taylor's "due process" rights. (App. 287, No. 52.1.3 [Policy]). The City and the PCPD's IBIR wilfully and intentionally destroyed the IBIR's impartiality as

to Taylor depriving him of his liberty and property without due process, when they, to wit:

a. wilfully denied Taylor's due process mandated by the Constitution, the CBA and the Manual, including Numbers 11.4.1 ("the Chief is to try and correct any improper condition revealed"); 52.1.2 by circumventing the required independent confidential Internal Affairs investigation; and 52.1.4, inasmuch as Taylor was not notified of the final disposition of the complaint within the time limit as specified by the CBA, *i.e.* 45 days, *and* what penalty assigned, if any (App. 32-36, CBA Art. XXVI[D][2][b], App. 66);

b. immediately following the accident and post-termination, published, about Taylor, to the community through Television and Newspaper media, false, defamatory and professionally stigmatizing, and embarrassing statements concerning facts, relevant to PCPD inquiry (*i.e.* "Officer Taylor's drunkenness caused the accident killing Taylor'S friend" or words to that effect and publicizing Taylor's firing for drinking and killing his friend), required to be confidential pursuant to and in violation of Manual Nos. 1.1.5a, Arts. 4.4 (rumors) and 22 (confidential information); and, 52.1.2 (Internal Affairs Procedure) (App. 32 and 669);

c. wilfully deprived Taylor of his right to confront evidence against him *per* unconstitutional Manual No. 52.1.3 [Hearing], to wit, "The accused officer does not have the right to cross examine witnesses" when applied so as to deprive Taylor of his right to confront the evidence relied-upon by the IBIR and used to terminate Taylor's public employment (App. 32);

d. wilfully refused to afford him a meaningful and impartial pre-termination hearing when the IBIR held a secret hearing, approximately one hour before the IBIR hearing attended by

Taylor, at which time IBIR members Piel and Ingmire were intimidated, prejudiced and ordered by Ham, and Van Hoesen, at Ham's direction, to recommend, regardless of the evidence and past and present PCPD employment practices, Taylor's termination from the PCPD; and conducted the IBIR hearing without publicly stating to Taylor its recommendation; and wilfully failed to publicly cast and record its vote as to the proposed recommendation (App. 32-33);

e. refused to "list the evidence" against Taylor, as required by Manual No. 52.1.3 [Hearing] thereby depriving him of the right to meaningfully confront any evidence offered against him, or to present the evidence necessary to present his defense (App. 33);

f. refused to impartially listen to evidence presented by Taylor which completely refuted the charges listed in the "Notification of Hearing" (App. 33 and 39);

g. wilfully refused and failed to publicly (at the hearing), properly and timely announce the effect the incident had to Taylor's continued employment; and IBIR-recommended discipline for Taylor *per* Manual No. 52.1.3 (App. 33 and 287), to wit:

> I. "PROCEDURE . . . The IBIR will review the investigation file and hear from the officer any mitigating circumstances or reasons for his actions. The IBIR will then give to the chief of police, or his designee its recommendation. The chief of police or his designee will consider the IBIR Board recommendation. The recommendation can be followed or altered by the chief of police or his designee.

ii. *At this point, the chief or his designee will advise the officer what punishment, if any, he is prepared to issue*" (emphasis added); and

"The purpose of the pre-hearing is to determine . . . what effect these reasons will have on your continued employment . . ." and, "what action should be taken in regards to" continued employment.

This wilful refusal to follow established procedure deprived Taylor the opportunity to offer evidence of prior city practice of discipline administered in similar cases; the opportunity to argue against the recommended discipline; and to offer resignation, or, other settlement rather than be terminated or litigate (App. 33);

h. wilfully violated policies and procedures when Van Hoesen signed, on behalf of IBIR member Gary Ingmire, and secretly submitted, to Ham, its Findings and Recommendation to terminate Taylor's employment with the PCPD, resulting in Taylor's termination and violating Manual No. 52.1.3 (App. 33 and 393); and

I. wilfully refused to pay wages and benefits earned by Taylor and in the form of "Retirement Sick Leave" (App. 3 Art. XXIII) in the sum of $3,048.72; and "Compensation Time" (App. 3 Art. XVII) in the sum of $102.48 for an 8 hour court appearance on January 11, 1994. (App. 33).

The City and Ham acted to deprive Taylor of guaranteed rights of due process as contained in the CBA, they, to wit:

a. refused to comply with CBA Art. XXVI(D)(2)(A) thus depriving him of seasonable notification of the charges brought against him, so as to fully inform him of the nature and

circumstances of the alleged violations so as to be able to properly defend himself. (App. 34).

b. refused to give him the same Constitutional Rights as any citizen, *per* CBA Art. XXVI[D][3], by using "charges" as an independent basis for termination. (App. 34);

c. wilfully failed to notify Taylor within forty five (45) days of the initial complaint and advise him of the penalty assigned *per* Manual No. 52.1.4, (App. 34); and, in CBA Art. XXVI[D][2][b], (App. 65-67);

d. wilfully terminated him without just cause as required by contract thereby treating him dissimilarly from similarly situated prior and post Taylor-termination offenses committed by PCPD officers (App. 34, CBA Art. IV[A][6], App. 44);

e. wilfully terminated him without just cause applying pressure by high ranking administrators to certain IBIR members (App. 34 and 39);

f. wilfully deprived him, by the use of artifice, delay and legal confusion, of his constitutionally guaranteed right to a full, expedient and impartial post-termination hearing, thus, wilfully refusing to arbitrate his termination grievance notwithstanding Taylor's seasonable exhaustion of all pre-requisite grievance steps (App. 35, 36 and 365-378, Art. XXVII and 15-24);

g. wilfully created and ignored conflicts of interest in Union membership by allowing ranking administrative officers to be members of the Union who have in turn represented and advocated interests adverse to Union membership and using their influence as ranking administrators of the PCPD to intimidate Union members from performing their Union duties. (App. 35).

Taylor was acquitted of all charges, including Driving Under the Influence and First Degree Manslaughter. (App. 656 and 668).

Taylor has never been given the opportunity to refute the evidence against him that allegedly support the reasons given for his termination (App. 32-36), other than his successful defense of the criminal charges.

Despite being informed of alleged conduct which formed the basis of the allegations against him by the City, Taylor was never given a summary of the evidence or notice of the specific factual allegations which formed the basis of his termination. (App. 654-658).

The procedures for the IBIR were not followed. (App. 654-658, No. 52.1.3).

Taylor denies receiving the February 4, 1994 Hearing Notice as stated in the City's "Statement of Facts" number 6. (App. 654-658).

The City, in its IBIR hearing, completely ignored all of the evidence as to the cause of the accident of December, 1993. (App. 666).

This IBIR was influenced by Chief Ham. (App. 666).

Taylor was deprived of an opportunity to offer evidence of prior city practice of discipline administered in similar cases, to argue against the recommended discipline and/or offer resignations rather than termination. (App. 33).

Taylor was denied his right to have an impartial decision-maker render the decision regarding discipline as Ham claims

to be a witness to Taylor's intoxication on the night in question, controlled the IBIR, suspended Taylor without pay and without authority, and terminated Taylor without giving him proper notice of the evidence and without following PCPD Policy No. 52.1.3 the stated purpose of which is to provide the accused officer with due process. (*See* App. 654-666).

Ham has been present and pressed termination and support for his decision at all levels of review and thus unfairly influenced other decision-makers such as City Manager Martin. (App. 654-666). Moreover the City is unable to show that a full post-termination hearing was ever held.

The City is responsible for the publication of the circumstances surrounding Taylor's termination which the City does not deny is stigmatic and false. (App. 669-671).

Ham is responsible for the publication, through a private citizen, D. Bohon, to the employees of J.C. Penny's in Ponca City Oklahoma that suspended Taylor would be fired because he guilty of a felony and would receive a two year prison sentence for committing the felonious manslaughter of Mike Morris. (App. 670-671).

The City and/or Ham has communicated with the arbitration panel and filed motions without notice to Taylor or his legal representative, Ken Holmes. (App 654-655). Mr. Holmes denies that he ever stated to the City or Ham that Taylor received due process in the course of his pre or post termination procedures. (App. 673-677).

Taylor has been denied subsequent public employment with the City and as a police officer in other surrounding communities due to the circumstances surrounding his termination as an officer with the City. (App. 38 and 655).

City policy makers issued statements, policy or custom of motions conducting arbitration until after the criminal trial in the derogation of CBA rights. (App. 377).

At all times relevant herein, Plaintiff's counsel, Mary Rounds and Andy Lester had an agreement to cooperate with discovery and to not require either party to have to respond to respective dispositive motions without first having completed the depositions sought by each side. On the 8th and 9th day of May, 1996 the depositions of Gary Martin, Jana K. Howell, Everett Van Hoesen, Don Ray, Bob Steiber, Don Bohon were scheduled with Taylor's response time to Defendants dispositive motions in mind and pursuant to agreement between counsel. (App. 49).

The criminal trial of *State v. Richard L. Taylor* (the plaintiff) commenced in March of 1996. The trial lasted more than one week and interfered with scheduled discovery in the instant case. Due to the failure to make discovery agreements to extend discovery, the response time were agreed upon by counsel. The latest agreed response time requires that Taylor respond by Monday May 13, 1996 to the City's, *et al.* dispositive motions. In support of the City's agreement to extend discovery and disclosure of witnesses Taylor offers the affidavit of Kelly Renné and Kathleen Briggs. (App 492 and App. 518-521).

The City informed this counsel that they sought to limit discovery based upon the qualified immunity defense and was going to quash the notices of any deposition in order to test the legal sufficiency of their arguments. Taylor noticed the depositions for the 29th and 30th day of April, 1996. These dates were specifically requested by the Defendants' counsel in order to accommodate their schedule. Shortly thereafter the Defendants filed their objection to the continuation of discovery, the production of documents and the taking of the depositions

and sought a protective order on their qualified immunity defense. (App. 493).

On or about the 16th day of April, 1996 The City sent additional documents that were required to be disclosed under self-compelled disclosure rules (these documents show additional due process violations suffered by Taylor as they show City communication to the arbitration panel without affording Taylor notice and opportunity to respond). The City still refused, despite several good-faith efforts by the undersigned to obtain other documents relative to Taylor's claim, including, but not limited to the document request served upon the City during the discovery period. (App. 493).

On or about the 23rd day of April, 1996 the court refused to extend discovery beyond its May 1, 1996 cut-off, noting the defendants objections. The objections were a surprise and shock to this office. Nevertheless Taylor pressed on hoping to complete discovery and prepare for the trial without creating a huge dispute about failed agreements. (App. 493).

On or about the 24th day of April, 1996 counsel for Taylor conferred in good-faith with Rounds and Lester by joint local and long distance telephone conference initiated by the undersigned. At that time it was agreed the depositions as scheduled would be allowed subject to the court's ruling on the qualified immunity defense. It was further discussed that two of those depositions were non-party depositions necessary for the presentation of plaintiffs' case on damages and other issues. Rounds and Lester agreed that the depositions of Howell and Bohon could be taken as scheduled or taken after a ruling on the qualified immunity defense, the lack of timeliness of the notice notwithstanding. Counsel also agreed to meet and confer together regarding completion of discovery and qualified immunity. (App. 494).

On or about the 26th day of April, 1996 counsel for Taylor met with Mary Rounds, counsel for the city, where the parties again agreed to take the depositions of Howell and Bohon at the same time that we took the other depositions. They were otherwise unable to agree on discovery issues. (App. 494).

On or about May 6, 1996 Taylor and the City through counsel agreed to a dismiss the individual City officials, with the exception of Ham in exchange for the depositions previously scheduled on May 8, 1996; and to conduct interviews, with City and Union representatives listening to the interviews on May 9, 1996. At all times relevant to this agreement the City knew that Taylor was seeking evidence that was probative of his claims and would be necessary to a full and adequate response to its dispositive motions. (App. 494-495).

On May 8, 1996 Taylor agreed with defendant Union's offer to dismiss with prejudice FOP Lodge #103 with prejudice and its members, Don Ray and Bob Steiber. In exchange Taylor sought and obtained Union agreement to allow the depositions of Ray and Steiber and to inquire into areas of selective enforcement of policies and procedures designed to control the Union by Chief Ham and to inquire as to any other matter that was relevant to the wrongful termination of Taylor by Ham. Mr. Moore sought and obtained an agreement from Taylor that he would not inquire as to any conspiracy between the Union grievance committee that refused to represent Taylor on his grievance. (App. 495).

On May 8, 1996 the Defendants announced at the commencement of depositions that they would not produce Jana Howell (*i.e.* damages, due process and arbitration issues) or Mr. D. Bohon (*i.e.* publication of stigmatic reasons for termination) as it was "their intention" that Taylor dismiss all individual parties or Taylor would not be allowed to take all of

the depositions. This was never the agreement. Once again the City thwarted Taylor from being able to collect evidence necessary to prepare for trial and to respond to the dispositive motion. (App. 495).

The City used Bob Steiber to inform the officers regarding Taylor's request for interviews. Intending to interview and collect affidavits that opposed the City's dispositive motions counsel agreed to extend Taylor's response time to Monday, May 13, 1996. (App. 496).

Nearly 90% of the deposition of Steiber is Steiber saying, "I refuse to answer that question on advice of counsel" (App. 570-576). Stieber did answer questions regarding the type of notice that he gave fellow police officers regarding Taylor's request for interviews. Steiber admitted that he advised all he contacted that union counsel Jim Moore had instructed the entire union to not answer any questions, as to material areas of inquiry, such as selective discipline, invasions of privacy, union animus and control, criminal activities occurring, and other matters material to Taylor's inquiries "On advice of counsel". A general notice (App. 504) was Steiber's method of informing them, however Taylor did not know this until the letter was brought to Taylor by a current member of the PCPD. (App. 570-576).

As a result of Steiber's admitted tampering with witnesses and due to the undersigned's personal knowledge that many officers fear retaliation in their employment if they voluntarily come forward with information, the undersigned canceled the interviews. (App. 504).

Taylor and his counsel have been contacted by current officers who are willing to testify and give this court an affidavit, but not without assurance that they will not be harassed or

retaliated against by the City. The undersigned has also been told that the loss of their jobs shall cause severe emotional distress (at least one officer has killed himself as a result of the manner in which he was terminated) and that they must have protection from this court prior to their granting permission to file their testimony in support of Taylor's claims against the City. (App. 498, 657 and 730).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DISREGARDS THIS COURT'S PRIOR RULINGS ON THE CRUCIAL ROLE OF DUE PROCESS TO DEPRIVATION OF LIBERTY AND PROPERTY.

Taylor's petition should be granted because the opinion below disregards this court's prior rulings on the crucial role of due process to deprivation of liberty and property. The District Court must be reversed or the wilful, oppressive and abusive denial of substantive and procedural due process due Taylor, by the City and Ham, will result in an innocent-accused employee's deprivation of his liberty and property without having a, constitutionally required, impartial pre-termination hearing and a reasonably prompt, full and impartial post-termination hearing. The decisions of the District Court and the Court of Appeals should be reversed inasmuch as they conflict with Amends. I, V and XIV, U.S. Const.; and, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), at 1496; and, the wilful denial of his bargained-for arbitration hearing and his liberty interest are remedied under 42 U.S.C.A. § 1983.

In granting summary judgment in favor of the City and Ham the federal courts have erred in its ruling on non-hearsay that is pivotal to Taylor's claims of liberty. The errant ruling is reflective of the prejudice Taylor has suffered at the hands of the government and the courts because of apparent criminal conduct committed by Taylor. Taylor was acquitted of all charges by a criminal jury but has been wilfully and arbitrarily denied his property right to grieve his discharge in accordance with a bargained-for collective bargaining agreement. *Loudermill,* and other opinions of this Court grant jurisdiction to the federal court to insure that citizen's liberty and property rights are not deprived without due process of law. *Loudermill, supra*; and *Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The actions by the City in relation to its discharge of Taylor have been wilful and malicious. They created for Taylor arbitrary policies such as the arbitration shall not be had until after the criminal trial; it was not obligated to honor the contract because Taylor was accused of criminal conduct; it refused to pay for their ½ share of the cost of arbitration; and successfully delayed the arbitration without notice to Taylor. Ham informed the private citizens that Taylor would be fired for having been found guilty of his alleged criminal behavior. Yet, Taylor, to this day still has not received any post-termination hearing consistent with *Loudermill.*

Convinced of that Taylor would be convicted before his arbitration hearing could be had, Chief Ham sought to replace During this process Ham stated to at least one private citizen (who told others) that Taylor was going to be convicted and incarcerated for his criminal behavior and therefore Ham could go ahead and replace Taylor. As a result Taylor suffered a loss of liberty. *See Board of Regents v. Roth*, 408 U.S. 564, 573, 92

S. Ct. 2701, 2707, 33 L. Ed. 2d 548 (1972); *Codd v. Velger*, 429 U.S. 624, 628 97 S. Ct. 882, 884-85, 51 L. Ed. 2d 92 (1977); *Paul v. Davis*, 424 U.S. 693, 710, 96 S. Ct. 1155, 1164-65, 47 L. Ed. 2d 405 (1976); and, *Bishop v. Wood*, 426 U.S. 341, 348 96 S. Ct. 2074, 2079, 48 L. Ed. 2d 684 (1976).

The federal court's judgment and opinion's lay in direct conflict with the constitutional principles espoused in the cases cited above. The actions of the City reflect a horrendous prejudice against Taylor causing it to act as a dictator instead of the fair arbiter of rights that is required here. If Taylor's writ is not granted dictatorship shall reign supreme over constitutional rights and justice.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE ADOPTION BY THE WESTERN DISTRICT COMPULSORY DISCLOSURE OF EVIDENCE AND IN ORDER THAT TAYLOR MAY MAKE A PROPER RECORD IN OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT.

Taylor's petition for writ of certiorari should be granted because the opinion below conflicts with the adoption by the Western District compulsory disclosure of evidence and in order that Taylor may make a proper record in opposition to the City's motion for summary judgment. The trial court abused its discretion when it ordered Ham to submit to a deposition, only to have Ham refuse, then granted judgment against Taylor. This was an abuse of discretion inasmuch as Taylor's was denied the opportunity to develop liberty interest claim by gathering evidence from Ham. The trial court opined that at best all Taylor could offer as evidence to support his claim that Ham had

impugned Taylor's good name and reputation was inadmissable hearsay. *See* Appendix page 17a.

Taylor contends that the evidence offered to show the slander published by Ham was not "inadmissable evidence." Nevertheless, without the testimony from Ham, the trial court ruled that Taylor was unable to prove his case. The prejudice to Taylor is obvious.

In addition to the foregoing the trial court was made aware that the City, through its police officers were obstructing justice by intimidating witnesses (other officers) from volunteering evidence that would have bolstered Taylor's proof in support of his claims. The court abused its discretion in ignoring Taylor's problems and the City's behavior in tampering with witnesses and depriving testimony, despite court order. FRCP Rule 56(f); and, *DiCesare v. Stuart*, 12 F.3d 973 (10th Cir. 1993).

On March 1, 1996 the U.S. District Court for the Western District adopted compulsory discovery. *See* Local Rule 26.2 of the United States District Court for the Western District of Oklahoma. (Appendix C). Notwithstanding the duty of the defendants in this case to come forth with pertinent information the trial court has allowed them to ignore its orders and intimidate witnesses. This is an abuse of discretion that prohibited Taylor from making a record.

CONCLUSION

This case presents a question of exceptional importance — whether a collectively bargained for post-termination hearing is a property right that has been deprived Taylor without due process of law as is required by the constitution, and the facts of this case. By denying Taylor's request for injunctive relief the federal court's have allowed the City to avoid the necessity of properly terminating a police officer who was wrongfully accused of criminal conduct. By granting Taylor's petition for certiorari the Court can correct the Tenth Circuit's decision, which defies this Court's longstanding holdings that the government may not deprive public servants of liberty or property without due process of law.

Accordingly, Richard L. Taylor respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

96-6245 & 96-6258
(D.C. No. 95-CIV-1650-M/L)
(W.D. Okla.)

RICHARD L. TAYLOR, an individual,

Plaintiff-Appellant-
Cross-Appellee,

v.

RAYMOND E. HAM, individually and in his official capacity as Chief of Police of the Ponca City Police Department,

Defendant-Appellee-
Cross-Appellant,

CITY OF PONCA CITY, Oklahoma, ex rel. Ponca City Police Department,

Defendant-Appellee,

and

EVERETTE VAN HOESEN, individually, and in his official capacity as Assistant Police Chief; BOB STIEBER, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; DON RAY, individually and in his

official capacity as Vice President of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; FRATERNAL ORDER OF POLICE, Lodge No. 103, an unincorporated association of Ponca City Police Officers; GARY MARTIN,

Defendants.

ORDER AND JUDGMENT*

Before PORFILIO and LUCERO, Circuit Judges, and MARTEN,** District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Plaintiff Richard Taylor was discharged from his position as an officer with the Ponca City, Oklahoma, police department after being involved in a one-car accident in which he was the driver and the passenger was killed. In appeal No. 96-6245, plaintiff appeals the district court's entry of summary judgment in favor of Chief Raymond Ham and the City of Ponca City on his claims that he was deprived of both property and liberty

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable J. Thomas Marten, District Judge, United States District Court for the District of Kansas, sitting by designation.

interests without due process in connection with his discharge. Plaintiff also appeals the district court's denial of his motion under Fed. R. Civ. P. 56(f) for an extension of time to take further discovery before responding to defendants' summary judgment motion.

In appeal No. 96-6258, Chief Ham cross-appeals the district court's May 22, 1996 ruling that he submit to a deposition. Chief Ham objects to the district court having ordered him to submit to discovery before ruling on his qualified immunity defense. In its final order of June 10, 1996, the district court determined that Chief Ham was qualifiedly immune, and entered judgment against plaintiff on all claims. Although the district court's final order obviated the need for Chief Ham to submit to a deposition, he filed the present protective cross-appeal in the event we reverse the district court's ruling on the merits of plaintiff's claims. Chief Ham acknowledges that his cross-appeal will be moot if we affirm the district court's final order of June 10, 1996.

Appeal No. 96-6245

We review the district court's ruling on plaintiff's Rule 56(f) motion under an abuse of discretion standard. *See International Surplus Lines Ins. Co. v. Wyoming Coal Ref. Svs. Inc.*, 52 F.3d 901, 904 (10th Cir. 1995). "When a party files an affidavit under Rule 56(f) for additional discovery time, . . . [t]he trial court may deny the affiant's request for additional time, deny the motion for summary judgment, order a continuance for additional discovery or make such other order as is just." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1553-54 (10th Cir. 1993) (citations and quotation omitted).

A party seeking time to conduct additional discovery under Rule 56(f) must provide an affidavit identifying what facts are not available and what steps the party has taken to obtain those facts. *See Committee for the First Amend. v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). "Rule 56(f) may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable. . . ." *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986). "Furthermore, if the party filing the Rule 56(f) affidavit has been dilatory, or the information sought is irrelevant to the summary judgment motion or merely cumulative, no extension will be granted." *Jensen*, 998 F.2d at 1554.

Here, plaintiff did not file an affidavit as such. Rather, his counsel filed a motion and brief, to which he attached his affidavit stating that all factual averments contained in the motion and brief were true to the best of his knowledge. Even if construed as the required affidavit, these documents did not meet the requirements of Rule 56(f). They neither set forth the specific facts plaintiff needed to discover, nor explained how such facts would have been useful to oppose defendants' motion. *See Jensen*, 998 F.2d at 1554-55. Further, the record reflects that plaintiff was dilatory in pursuing discovery before filing the Rule 56(f) motion. Under the circumstances, the district court did not abuse its discretion in denying plaintiff's Rule 56(f) motion.

We turn then, to the district court's grant of summary judgment to Chief Ham and the City of Ponca City on plaintiff's due process claims. We review the grant of summary judgment de novo, applying the same standards as the district court under Rule 56(c). *See Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995).

Plaintiff contended that the City and Chief Ham deprived him of his property interest in employment without due process. Primarily, plaintiff attacked the pretermination process he was given, in part because it did not completely conform to the process outlined in the collective bargaining agreement between the City and the police union. Plaintiff also attacked the post-termination process he was given, alleging that the City had refused to cooperate in the de novo arbitration hearing provided for by the collective bargaining agreement. The district court acknowledged that plaintiff had a property interest in his employment, but concluded that he received all the process he was due under federal law. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-57 (1985) (discussing the pre- and post-termination process due a tenured public employee under federal law).

Plaintiff also contended that defendants deprived him of his liberty interest by making public statements suggesting that he was guilty of the criminal offenses with which he had been charged, without giving him an appropriate name-clearing hearing. The district court concluded that plaintiff failed to establish that defendants infringed his liberty interests. Specifically, the district court determined that plaintiff failed to establish through admissible evidence either that defendants published information about plaintiff that was false and stigmatizing or that the alleged publication of such information foreclosed future employment opportunities. *See, e.g., Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 579 (10th Cir. 1996) (setting forth elements of claim for liberty deprivation).

The district court further ruled that Chief Ham was qualifiedly immune from plaintiff's claims, because plaintiff failed to establish that Chief Ham's actions violated any

constitutional right. *See, e.g., Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988) (holding that, to overcome a qualified immunity defense, a plaintiff must "show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred"). Similarly, the court ruled that plaintiff failed to establish any liability on the part of the City, because he failed to show the deprivation of any constitutional right, much less a causal link between a constitutional deprivation and any custom or policy of the City. *See, e.g., Jenkins v. Woods,* 81 F.3d 988, 993 (10th Cir. 1996) ("To establish municipal liability, a plaintiff must show (1) the existence of a municipal custom or policy and (2) a direct causal link between the custom or policy and the violation [of a federally protected right] alleged.")

Based upon our review of the record, the parties' briefs, and the controlling law, we conclude that the district court properly granted summary judgment to defendants City of Ponca City and Chief Raymond Ham on plaintiff's claims for deprivation of property and liberty interests without due process. We, therefore, AFFIRM the judgment of the United States District Court for the Western District of Oklahoma for substantially the reasons set forth in its Order of June 10, 1996. Our affirmance of the district court's final order moots Chief Ham's protective cross-appeal in No. 96-6258, which is DISMISSED.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX B — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FILED JUNE 10, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-95-1650-M

RICHARD L. TAYLOR, an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

ORDER

Before the Court is the Combined Motion for Summary Judgment of defendants[1] City of Ponca City. Oklahoma, ex rel Ponca City Police Department ("City") and Raymond E. Ham

1. On June 4, 1996, plaintiff filed stipulations of dismissal and dismissed the following defendants with prejudice: Everette Van Hoesen, individually and in his official capacity as Assistant Police Chief; Bob Steiber, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; Don Ray, individually and in his official capacity as Vice-president of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; Fraternal Order of Police, Lodge No. 103, an unincorporated association of Ponca City Police Officers; and Gary Martin, individually and in his official capacity as City Manager of Ponca City, Oklahoma.

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individually, and in his official capacity as Chief of Police of the Ponca City Police Department ("Chief Ham"), filed on April 1, 1996 Plaintiff Richard L. Taylor ("Taylor") responded in opposition on May 29. 1996 and the defendants filed a reply brief thereto. Based upon the parties' briefs and evidentiary materials submitted therewith, the Court makes its determination.

This is a civil rights case. Taylor was a police officer in the Ponca City Police Department from September 23, 1985 until his termination on February 17, 1994. On December 18, 1993, Taylor was involved in a single car accident occurring in Kay County in which a passenger, Timothy Michael Morris, was killed. Taylor was charged with manslaughter in the first degree by Joseph A. Wideman. Kay County District Attorney, based upon allegations that Taylor caused the death of Morris while driving under the influence of intoxicating liquor.[2] The official accident report dated December 24, 1993, indicated Taylor's blood alcohol content was .27 at the time of the accident. Adopting the recommendation of Taylor's peer review board, on February 17, 1994. Chief Ham terminated Taylor's employment with the police department.

In this 42 U.S.C. § 1983 action, Taylor alleges the following causes of action against the defendants: 1) deprivation of property and liberty interests in violation of the Fourteenth Amendment. 2) violation of the First Amendment, and 3) conspiracy[3]. Defendants have moved for summary judgment on all of plaintiffs claims.

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2. Taylor was acquitted of all criminal charges in March 1996.

3. Due to the dismissal of defendant Fraternal Order of Police, Lodge No. 103 ("FOP") and its officers, plaintiff agrees his (Cont'd)

Appendix B

Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Unisys Corp,* 54 F.3d 624, 627-28 (10th Cir. 1995). The evidence and any inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the summary judgment. *Id.* However, "[e]ven under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). "The opposing party . . . must identify sufficient evidence to require submission of the case to a jury." *Jones,* 54 F.3d at 628. Once a movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986). "The nonmovant must go beyond the pleadings and, by affidavits or the depositions, answers to the interrogatories, and admissions on file, designate specific facts showing, there is a genuine issue for trial" *Celotex Corp v. Catrett,* 477 U.S 317, 324 (1986) "Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof." *Brown v. Youth Center at Topeka.* 883 F. Supp. 572, 575 (D. Man. 1995) (citing *Celotex*, 477

(Cont'd)
conspiracy claim no longer exists. *See* Taylor's Response and Brief in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Response") at 9 (May 29, 1996). The dismissal likewise eliminated Taylor's state claim for the breach of covenant of good faith and fair dealing in contracts against the FOP.

U.S. at 322). "Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial." *Id.* (*Celotex*, 477 U.S. at 323).

Fourteenth Amendment Claims

A. Property interest

Taylor alleges defendants deprived him of a property interest in his job by failing to give him the procedural due process he was entitled to under the Fourteenth Amendment to the United States Constitution. The following contentions form the basis of plaintiff's claim:

1) His pretermination hearing was biased because members of the Internal Board of Inquiry and Review ("IBIR"), a three member panel of an officer's peers were intimidated and forced by Chief Ham to recommend his termination;

2) He was terminated solely because of the filing of a felony charge against him and he was treated differently than other officers with alcohol related traffic offenses:

3) At the time of his termination, he had not been found guilty of the criminal offense:

4) He was never given an opportunity to refute the evidence presented against him that supported the reasons for his termination;

5) He was never given a summary of the evidence or notice of the specific factual allegations against him: and

6) The procedures outlined in the collective bargaining agreement and the IBIR were not followed.[4]

The due process clause of the Fourteenth Amendment does not prevent a state from depriving an individual of property or liberty: it only requires a fair procedure be provided for the deprivation *Zinermon v. Burch*, 494 U.S. 113 (1990). In determining whether the plaintiff has been deprived of his right to procedural due process the Court must engage in a two-step inquiry: (1) does the plaintiff possess a protected property interest so that due process protections are applicable, and (2) if so, was the plaintiff afforded the appropriate level of process. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Zinermon v. Burch*, 494 U.S. 113 (1990). It is undisputed that Taylor had a protected property interest in his employment as a Ponca City police officer. Thus, the question remains what process was due the plaintiff to deprive him of that property

> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. The [ ] public employee is entitled to oral or written notice of the charges against him explanation of the employers evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted

4. To the extent plaintiff argues defendants failed to follow contract or state law procedures, these deficiencies do not implicate rights under the Fourteenth Amendment. *See Russillo v. Scarborough*, 935 F.2d 1167 (10th Cir. 1991).

> extent on the government's interest in quickly removing an unsatisfactory employee."

Id. at 546.

Defendants argue plaintiff received all the process that was due before and after his termination. Defendants presented the following evidence in support of their argument that plaintiff was informed of the conduct which was the basis of the allegations against him and that plaintiff was given several opportunities to respond to the charges throughout the police department's disciplinary process:

1) On December 19, 1993, the night after the accident, Chief Ham met with plaintiff at the hospital and told him he would be placed on leave without pay.

2) On December 20, 1993, plaintiff was given a Notice of Investigation listing police department policies and procedures believed to have been violated by plaintiff and the incident where the violations occurred.

3) On December 31, 1993, plaintiff received a second notice about the department's criminal investigation as required under the Collective Bargaining Agreement and this notice informed plaintiff of the Predetermination Hearing to be held on January 7, 1994 at 10:00 a.m.

4) On January 7, 1994, Chief Ham held a predetermination hearing and Taylor submitted a written statement through his attorney.[5]

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5. Taylor had been advised by his attorney not to appear in person.

5) On January 10, 1994, Chief Ham notified Taylor that as a result of the evidence presented at the January 7 hearing, Taylor would be placed on leave without pay.

6) On February 4, 1994, Taylor was notified of a hearing of the IBIR to be held at 9:00 a.m. on February 9, 1994.[6] The IBM panel consisted of Assistant Police Chief Everette Van Hoesen, officer Gary Ingmire and officer Bruce Piel. The Hearing Notice contained a list of alleged violation of police department policies and copies of the applicable pages from the police department policies and procedures manual.[7]

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6. For the first time in his response to defendants' Combined Motion for Summary Judgment, Taylor disputes receiving the February 4 Hearing Notice. *See* Plaintiff's Response at 3 ¶ 8.

7. In the February 4, 1994 Hearing Notice, the IBIR identifier the following violations as a result of Taylor's driving while intoxicated which resulted in the death of another person:

1) 1.1.4 Oath of Office

2) 1 1.5 Code of Ethics

3) 1.1.5a Rules of Conduct:

Art 1. Performance of Duty

Art 2. Conduct Unbecoming of an Officer or Employee

Art 3. Intoxication or Drug Abuse

Art 7. Criminal Law Violations

(Cont'd)

7) On February 17, 1994, after considering the evidence presented at the February 14 hearing, the IBIR issued a report to Chief Ham and recommended Taylor be terminated.[8]

8) On February 17, 1994, Chief Ham notified Taylor he was terminated effective at 5:00 p.m. that day Taylor was also given a copy of IBIR's report,

9) On March 3 and 4, 1994, the FOP grievance committee, chaired by Donald Ray, reviewed Taylor's grievance of his termination. On March 10, 1994, Taylor was notified the grievance committee declined to pursue his grievance.

10) Taylor, with counsel, appeared at a hearing before the City Manager, Gary Martin. On March 29, 1994. Martin Chief Ham's termination decision.[9]

Furthermore, defendants presented evidence plaintiff had additional post termination hearing opportunities, including the right to appeal to the City Commission and binding grievance

(Cont'd)

a. Driving Under the Influence of Alcohol

b. Manslaughter 1st degree — Death resulting while in the commission of a misdemeanor

8. The IBIR received undisputed evidence concerning Taylor's condition the night of the accident as well as testimony from fellow officers in support of Taylor. At Taylor's request, Chief Ham did not attend the IBIR hearing.

9. Taylor's allegation that the City Manager was influenced by Chief Ham is unsupported by any evidence in the record.

arbitration.[10] In support of his claims. Taylor submitted numerous affidavits that contained unsupported conclusory statements and allegations as well as irrelevant matters. The Court finds these affidavits are insufficient under Rule 56(e) of the Federal Rules of Civil Procedure as they do not "set forth such facts as would be admissible in evidence." In addition, many of the affidavits including plaintiffs, do not set forth facts within the personal knowledge of the affiants.

Plaintiff's claim of bias in the IBIR predetermination hearing was supported by the affidavit submitted by officer Bruce Piel on December 7, 1995 stating he only voted for Taylor's termination because Chief Ham impliedly ordered him to do so and he feared retaliation and that the pretermination hearing was "pretextual biased and prejudiced."[11] However, officer Piel's affidavit is contradicted by his subsequent deposition testimony in which Piel admitted that 1) Taylor committed the policy violations as alleged and he believed this at the time he voted as a member of the IBIR 2) he voted to terminate Taylor, 3) Chief Ham "did not order me to vote; it was just an understanding of mine. He did not come out and order me to vote that way", and 4) neither Chief Ham or Assistant Chief Van Hoeson told him if he would be retaliated against if he didn't vote a certain way. See Deposition Testimony of Officer Bruce Piel February 26, 1996, attached as Exhibit J to Defendants' Combined Motion for Summary Judgment (April 1, 1996) ("Defendants' Motion").

10. On April 22, 1994, Taylor gave notice of his intent to pursue arbitration. The City contends it as well as the neutral arbitrator, P.M. Williams, were ready to go forward with arbitration. Plaintiff fails to provide credible evidence to the contrary.

11. Officer Piel gave a revised affidavit on March 22, 1996. *See* Exhibit 3 to Plaintiff's Response.

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Viewing the evidence in the light most favorable to plaintiff as this Court must do, plaintiff has failed to demonstrate any genuine issue of material fact. Plaintiff was advised of the charges against him and, even if he was not notified of the hearing to be conducted by the IBIR, plaintiff was afforded several opportunities afterwards to be heard and to present evidence. The Court concludes the procedures and opportunities afforded the plaintiff were sufficient to satisfy constitutional requirements. Defendants are entitled to summary judgment on plaintiffs claim of deprivation of a property interest without due process.

B. Liberty Interest

Plaintiff alleges defendants deprived him of a liberty interest without due process because Chief Ham disclosed "false, stigmatizing, embarrassing and confidential information."

To prevail on a liberty deprivation claim, the plaintiff must prove both 1) that his good name, reputation honor or integrity was stigmatized, and 2) that the defendants "imposed on him a stigma or disability that foreclosed his freedom to take advantage of other employment opportunities." *Lane v. Town of Dover*, 761 F. Supp. 768, 771-72 (W.D. Okla. 1991) (citations omitted). *See also Walker v. Elbert*, 75 F.3d 592, 597 (10th Cir. 1996). Plaintiff must also prove the that his "dismissal resulted in the publication of information that was false and stigmatizing." *Melton v. City of Oklahoma City*, 928 F.2d 920, 936-38 (10th Cir. 1991). In addition, there must be evidence any false and stigmatizing statements made by the plaintiffs employer occurred "in the course of the termination of employment." *Wulf v. City of Wichita*, 883 F.2d 842, 869 (10th Cir. 1989) (citing Paul v. Davis, 424 U.S. 693, 710 (1976)). Defendants argue are entitled

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to summary judgment on this claim because there is no evidence the defendants made any statements which affected plaintiffs ability to obtain future employment.

In support of this claim, plaintiff contends (1) a private citizen, D. Bohon, after speaking to Chief Ham announced to the public that he was going to replace Taylor, and (2) the local newspapers printed articles in which Chief Ham detailed his employment status and criminal charges before he was terminated. Neither contention supports plaintiffs claim.

First, Mr. Bohon, a private citizen, was not plaintiffs public employer so any statements allegedly made by Mr. Bohon will not support a liberty interest claim against the defendants. In additions plaintiff's only evidence of what Chief Ham allegedly told Mr. Bohon was an affidavit given by plaintiffs niece, Stacie Ball. This is clearly hearsay within hearsay. Like the plaintiff in *Lane*, Taylor's evidence is "conclusory on the falsity and stigmatization elements, and tainted with inadmissible hearsay on the publication element." *Lane v. Town of Dover*, 761 F. Supp at 772. Furthermore, there is no evidence that Chief Ham made any statements to the press at any time, let alone during the course of the termination proceedings. According to the newspaper article submitted as evidence by plaintiff, the newspaper stated that Chief Ham "was unavailable for comment" *See* Exhibit 5 to Plaintiffs Response (May 29, 1996). Finally, plaintiff has failed to provide any evidence that his termination by defendants foreclosed opportunities for other employment. While plaintiff states be was denied public employment as a meter reader and as a police officer in other communities, he presented no evidence these opportunities were foreclosed by stigmatizing remarks made by defendants. "A party resisting a motion for summary judgment must do more than make

conclusory allegations." *Lane v. Town of Dover,* 761 F. Supp. at 772 (citations omitted). Defendants are likewise entitled to summery judgment on the plaintiffs liberty interest claim.

First Amendment Claim

Plaintiff alleges he was terminated in violation of his right to free speech as protected by the First Amendment.[12] To prevail on this claim, Taylor must satisfy the three-prong test established by the United States Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under *Mount Healthy*, Taylor must initially show, as a matter of law, that his speech deserves constitutional protection. *Id.* at 287. If the speech is worthy of protection. Taylor must then prove as a factual matter his protected speech was a substantial or motivating factor in the adverse employment decision. *Id.* If Taylor makes such a showing, the burden then shifts to the defendants to prove "by a preponderance of the evidence that [they] would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

As stated Taylor must show his speech is constitutionally protected. To do so, Taylor must establish 1) his statements touched on a matter of public concern, and 2) his interest in commences on matters of public concern outweighs "the interest of the [police department], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See also Moore v. City of Wynnewood*, 57 F.3d

12. Plaintiff seems to argue his right to be pro-active in the union is constitutionally protected free speech. *See* Plaintiff's Response at 9 and 12.

924, 931 (10th Cir. 1995). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" *Connick v. Myers,* 461 U.S. 138, 147-48 (1983) (footnote omitted). The motive of the speaker will also be considered to ascertain if the speech was calculated to redress personal grievances or address incur section 1983 liability, the custom or policy must be "widespread" and involve a "series of decisions." *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995) (citation omitted) Finally. "a municipality may not be held liable where there was no underlying constitutional violation by any of its officers," regardless of the municipality's policy or custom. *Hinton v City of Elwood, Kansas*, 997 F.2d 774, 782 (10th Cir. 1993). Plaintiff has failed to identify any custom or policy for which the City should be held liable, let alone demonstrate that the City has a "widespread" policy or "longstanding practice" which caused a violation of plaintiffs constitutional rights. The City is entitled to summary judgment on plaintiffs claims.

Qualified Immunity of Chief Ham

Finally, defendants contend Chief Ham is entitled to immunity from suit. The affirmative defense of qualified immunity protects government officials from liability for civil damages unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (citation omitted). Once the immunity defense is raised, the plaintiff initially bears a heavy two-part burden. *Albright v. Rodriguez.* 51 F.3d 1531, 1534 (10th Cir. 1995). A plaintiff must "show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged

violation occurred." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citation omitted). If the plaintiff fails to show either part of this two-part test, the defendant is entitled to qualified immunity. Contrary to plaintiff's contention, *see* Plaintiff's Response at 14-15, the burden shifts to the defendant only if the plaintiff successfully carries his two-part burden. *Albright*, 51 F.3d at 1535. This Court has already determined plaintiff failed to show any violation of his constitutional rights. Accordingly, Chief Ham is entitled to qualified immunity.

Conclusion

Based upon the foregoing, defendants combined motion [Docket # 23] is GRANTED in its entirety.

IT IS SO ORDERED this 10 day of June, 1996.

s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 6-10-96

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-95-1650-M

RICHARD L. TAYLOR an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

ORDER

Before the Court are the plaintiffs Motions for Declaratory Judgment, Injunctive Relief and/or Writ of Mandamus and Partial Summary Judgment filed on January 30, 1996. Defendants[1] responded in opposition on April 1, 1996.

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1. On June 4, 1996, plaintiff filed stipulations of dismissal and dismissed the following defendants with prejudice: Everett Van Hoesen, individually and in his official capacity assistant Police Chief; Bob Steiber, individually and in his official capacity as President of Fraternal Order of Police, Lodge No. 103; Don Ray, individually and in his official capacity as Vice-President of Fraternal Order of Police, Lodge No. 103 and Grievance Chairperson; Fraternal Order of Police, Lodge No. 103, an unincorporated association of Ponca City Police Officers; and Gary Martin, individually and in his official capacity as City Manager of Ponca City, Oklahoma.

Appendix B

Plaintiff Richard L. Taylor ("Taylor") was a police officer in the Ponca City Police Department from September 23, 1985 until his termination on February 17, 1994. On December 18, 1993. Taylor was invoked in a single car accident occurring in Kay County in which a passenger, Timothy Michael Morris, was killed. Taylor was charge with manslaughter in the first degree by Joseph A. Wideman, Kay County District Attorney, based upon allegations that Taylor caused the death of Morris while driving under the influence of intoxicating liquor.[2] The official accident report indicated Taylor's blood alcohol content was .27 at the time of the accident. Adopting the recommendation of Taylor's peer review board, on February 17, 1994, defendant Raymond E. Ham ("Chief Ham") terminated Taylor's employment with the police department.

Taylor brought this action pursuant to section 1983 in title 42 of the United States Code alleging the defendants (1) deprived him of property and liberty interests in violation of the Fourteenth Amendment, (2) violated his First Amendment rights of free speech, and (3) conspired to deprive him of his constitutional rights. In the instant motions, Taylor seeks the following relief from this Court:

1) A declaratory judgment that (a) certain provisions of the Ponca City Police Department manual are unconstitutional (b) the Collective Bargaining Agreement in place at the time of his termination is enforceable, and (c) defendant City of Ponca City, Oklahoma, ex rel Ponca City Police Department ("City"), terminated his employment in violation of the Constitution;

---

2. Taylor was acquitted of all criminal charges in March 1996.

Appendix B

2) An injunction or writ of mandamus entered that reinstates plaintiff to his former position with back pay and benefits; or alternatively,

3) An injunction or writ of mandamus requiring the city to arbitrate this dispute pursuant to the Collective Bargaining Agreement or partial summary judgment on this issue.

On June 7, 1996, the Court granted defendants' Combined Motion for Summary Judgment in its entirety. In so doing, this Court concluded plaintiff had failed to come forward with sufficient evidence to proceed to trial on his section 1983 claims and the defendants were entitled to judgment as a matter of law. Based upon this ruling, the Court also finds, as a matter of law, that plaintiff cannot demonstrate entitlement to the relief requested in his motions.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-95-1650-M

RICHARD L. TAYLOR, an individual,

Plaintiff,

vs.

CITY OF PONCA CITY, OKLAHOMA ex rel. PONCA CITY POLICE DEPARTMENT, Oklahoma political divisions, et al.,

Defendants.

ORDER

Before the Court is the plaintiffs Second Motion for Discovery Sanctions and First Request for Extensions of Scheduling Orders and First Request for Continuance of the Trial, filed June 3, 1996.

On June 7, 1996, the Court granted the defendants' Combined Motion for Summary Judgment in its entirety. On that same day, the Court denied plaintiffs Motions for Declaratory Judgment, Injunctive Relief and/or Writ of Mandamus and Partial Summary Judgment.

Accordingly, the plaintiffs second motion for discovery sanctions [Docket #61] is DENIED and plaintiffs first requests for extensions and continuance [Docket #61] is MOOT.

Appendix B

IT IS SO ORDERED this 10th day of June, 1996.

s/ Vicki Miles-LaGrange
VICKI MILES-LaGRANGE
UNTIED STATES DISTRICT JUDGE

APPENDIX C — LR26.2 REQUIRED DISCLOSURE

(**a**) Prior to the first status and scheduling conference, each party shall, without awaiting a discovery request, disclose to all other parties:

(1) The identity of any expert witness the party intends to call, together with the expert's qualifications, a statement of the substance of the expert's expected testimony, and a summary of the grounds for the expert's opinion;

(2) A general description, including the location, of all books, documents, data, compilations, and tangible things in the possession, custody or control of the party that are likely to bear significantly on any claim or defense;

(3) The existence and content of any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or to reimburse for payments made to satisfy the judgment; and

(4) The identity of any witness who is known at the time to be likely to bear significantly on any claim or defense.

(**b**) Each party is under a continuing obligation to supplement or to correct the required disclosure if the party obtains additional information which makes previously disclosed information incorrect or incomplete.

(**c**) Every disclosure or supplementation by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign the disclosure. The signature of the attorney or party constitutes the certification under, and is consequently governed

by the provisions of the Federal Rules of Civil Procedure. In addition, signing constitutes certification that the signer has read the disclosure, and that the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the disclosure is complete as of the time it was made.

(**d**) All exhibits shall be physically exchanged or viewed and examined on or before the date and in the sequence specified in the scheduling order, or if no date is specified, three (3) days prior to the date for the submission of the proposed pretrial order, as no objections to the effect that exhibits have not yet been seen will be entertained in a proposed final pretrial order or otherwise.

(**e**) Unless the Court orders otherwise, the following categories of cases are exempted from the required disclosure provision of this rule: Administrative review cases, prisoner cases, bankruptcy appeals, collection cases commenced by the United States Government, enforcement of administrative summonses, and forfeiture cases.

(**f**) Failure to comply with the requirement of this rule may result in the imposition of sanctions by the Court.

[Effective March 1, 1996]

Supreme Court, U.S.
FILED
JUN 4 1998
CLERK

No. 97-1790

In The

Supreme Court of the United States

October Term, 1997

MICHAEL LAWSON and EDIE TUCKER,

Petitioners,

vs.

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The procedural history of this matter through this Court's denial of certiorari, 515 U.S. 1110 (1995) is set forth in petitioners' submission. In June, 1995, Dr. & Mrs. Murray moved from Westfield, New Jersey, to 11 Thistle Lane, Warren, New Jersey. They attempted to make this move without alerting the picketers. No signs were placed on the house in Westfield and it was listed in the wife's maiden name. The plaintiffs told neither their neighbors in Westfield, nor the Westfield Police where they were moving. Despite their best efforts to keep the location of their new residence private, Dr. Murray was certain that his vehicle was followed home from his private office in Plainfield late on a Monday night at the end of October. Two weeks after that incident, the picketers did arrive at the Murrays' new home in Warren.

Prior to being followed from his Plainfield office and subsequent to the Westfield litigation, posters with Dr. Murray's picture were placed on telephone poles in towns throughout New Jersey and postcards were sent anonymously to neighbors with Dr. Murray's face, his addresses and words identifying him as an "abortionist". The poster resembled a "wanted" poster. These incidents caused Dr. Murray concern about his safety and the safety of his family. Petitioner Lawson acknowledged that he ordered and sent the postcards and ordered and placed the posters.

On Sunday, November 19, 1995, the respondents and their family were at an auction when Dr. Murray received a call through his beeper to contact the Warren Police. It was in that setting that respondent was informed that the picketers were going to be picketing at his new home in Warren. Dr. Murray was confident that the Injunction entered in Westfield was applicable to his present residence as well. The respondents left

the auction immediately to return home, but did not arrive until the picketers were leaving.

According to Officer Kingsland, the Supervisor on duty on November 19, 1995, he received a telephone call at around noon from Michael Lawson, who advised that he was coming to Warren to picket at Dr. Murray's house. Mr. Lawson did not know Dr. Murray's precise address when questioned by Officer Kingsland. The Department had been alerted to the fact that Dr. Murray had moved to town and that he had experienced problems with picketers in Westfield. Therefore, Officer Kingsland contacted the Westfield Police Department and received a fax of the Injunction. Officer Kingsland confirmed that he also reached out to notify Dr. Murray of the impending picketing activity. Officer Kingsland communicated with Assistant Prosecutor Cirichella regarding the Injunction who advised that, at least for the day, the Injunction would be enforced. Officer Kingsland met petitioner Lawson as he arrived on the scene of Thistle and Rockage and informed him of this enforcement decision. While petitioner Lawson indicated his disagreement with the position, he agreed to comply with the 100 foot buffer zone. Officer Kingsland overlooked the fact that there were between 15 and 20 picketers present on that date.

The picketers next appeared on December 17. The respondents were surprised by their presence. The family had just returned from church and they were going to Harlem to attend a play when they first saw the picketers. The family drove to Broadway, the street behind Thistle Lane, to observe the picketing activity. Mrs. Murray was anxious for the children to leave when they observed the picketers but the family did not continue into New York, the picketing ". . . messed up our plans".

On January 28, 1996, the picketers reappeared. The Murrays had been informed of the impending picketing and Mrs. Murray

and the children left the home while Dr. Murray remained behind. Mrs. Murray explained that the stress associated with the picketing has increased since the initial picketing in 1991. Starting on Fridays, she is anxious waiting to see if there will be a call that the picketers are going to come on Sunday. In addition, given the continued activities of defendant Lawson, she worries that he is unstable and feels that he is a threat to the safety of her husband and her children. There is almost some relief when they do come because then she knows she has almost two weeks before she begins to worry about their appearing again. The larger the number of picketers the greater the impact according to Mrs. Murray but it is defendant Lawson that causes her the most stress, "But you know if just Michael Lawson was out in front of our home, it would be the same as if 10 or 15 were there. Because I just feel threatened by him being there." Dr. Murray is also concerned about the number of picketers and their proximity to his home. "I think one defendant is sufficiently threatening and then you multiply it by 15. I think we have good reason to be concerned." He would be fearful for his children, ages 11 and 15, who continue to live at home, to be in their front yard when the picketers are there, "We are afraid for our children . . . I think anyone physically at my home uninvited is a threat."

Michael Lawson, age 34, resides in Freehold, NJ, at the home of Edie Tucker. He has resided that for 11 years. For the last six years, he has been employed at A&P on the night crew stocking shelves. Petitioner Lawson has been involved in anti-abortion activities for the last 6 years. While Mr. Lawson claimed to have picketed at clinics other than the one in Howell and at doctors' residences other than that of Dr. Murray, he acknowledged that in the last year, he has not appeared at any other clinic and that within the last year, he has not appeared more than 2 or 3 times at any other doctor's residence. Lawson also admitted that he personally arranged to have the postcards

printed with Dr. Murray's face, addresses and description as an abortionist and that he alone addressed the postcards. He further acknowledged that he never had postcards prepared for any of the other doctors whose homes he had picketed. He acknowledged that he arranged to have the posters in neon bright pink printed with Dr. Murray's picture and he further admitted that he alone put up the posters and that he did not have posters prepared with any other doctor's picture.

Lawson explained that when learning that the Murrays no longer lived in Westfield, he stopped picketing there and undertook efforts to discover where Dr. Murray lived. It was after discovering his new address that he organized the demonstration for his new residential neighborhood in Warren.

At the hearing, the petitioners indicated that if an injunction had not been issued, they would be able to bring many more picketers since the neighborhood can accommodate large numbers of people. The trial judge found that the only reasons the respondents were not under siege in Warren was due to an injunction being in place. Pa at 19a-20a. The trial judge conducted an extensive comparative analysis of the Murrays' residence in Westfield, NJ, with their new residence in Warren Township. Pa at 21a-23a. Based upon that comparison and an analysis of the New Jersey Supreme Court decision in *Murray v. Lawson*, the trial judge crafted restrictions that burden no more speech than is necessary to protect the Murrays' residential privacy interests. Those restrictions varied from the Westfield restrictions in terms of the buffer zone itself and the number of picketers permitted. In Westfield, there was a buffer zone extending 100 feet from the boundary of the Murray property. In the instant case, picketers were prohibited from picketing within a buffer zone coterminous with the sidelines of the Murray residence. In Westfield, the number of picketers was limited to ten; in the instant case the number was expanded to fifteen.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' histrionics and hyperbole, the New Jersey court decisions do not conflict with decisions of lower federal courts or of this Court. The decision below faithfully applies this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), to facts set forth in a comprehensive record developed by the trial court. It carefully adjusted the free speech rights of petitioners, and the state's and respondents' interests in residential privacy, so as to "burden no more speech than necessary" to protect those interests. The writ, therefore, should be denied.

I.

THE INJUNCTION AT ISSUE IN THIS CASE IS NOT A PRIOR RESTRAINT.

Petitioners argue, as they have in previous petitions to this Court, that the injunction at issue here is unconstitutional as a "prior restraint". This Court's decision in *Madsen*, however, categorically rejected this argument.

In reviewing the propriety of an injunction creating a 36-foot no-picketing "buffer zone" around a Florida abortion clinic, this Court said the injunction was not a prior restraint for two reasons, both of which apply here. First, unlike valid time, place and manner regulations, prior restraints absolutely ban a message in advance of publication. In contrast, the "petitioners [in *Madsen*] are not prevented from expressing their message in any one of several ways; they are simply prohibited from expressing it within the 36-foot buffer zone." *Madsen*, 114 S. Ct. at 2524 n.2. Similarly, here petitioners are simply prohibited from expressing their message within a buffer zone coterminous with the sidelines of the respondents' residence. Outside that

zone, they are free to display any message they please. Moreover, under the terms of the present injunction, that message is in full sight of all who care to view it, even the Murrays, should they look out their window or step outside their home.

Second, this Court said in *Madsen* that "the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct." *Id.* The same analysis applies here. The New Jersey Chancery Court issued the injunction, not to quash respondents' message, but to prevent a method of expression that this Court has acknowledged "inherently and offensively" intrudes on residential privacy. *Frisby*, 487 U.S. at 486.

Petitioners misconstrue this last statement from *Madsen* to mean that a finding of prior unlawful conduct is a precondition to a finding that an injunction aimed at picketing is not a prior restraint. The New Jersey Supreme Court correctly rejected this argument. The correct constitutional inquiry, as stated in *Madsen*, is whether the restraint can be justified other than by reference to the content of the message. Nothing in *Madsen* or any other case suggests that prevention of unlawful conduct is the only non-content-based rationale that takes an injunction out of the category of prior restraints. Indeed, in *Madsen*, this Court did not find the trial court's injunction a prior restraint, despite the fact that no crime or tort had been committed by the demonstrators in relation to that activity.

II.

THE PETITIONERS ENGAGED IN TARGETED PICKETING AND, THUS, THE INJUNCTION ENTERED WAS PROPER TO PROTECT THE RESPONDENTS' RESIDENTIAL PRIVACY.

Petitioners present the novel argument that the picketing in the instant case was not "targeted picketing" and that the trial judge erred in designating the picketing as targeted based upon plaintiff's identity on the signs. To suggest that the injunction is content-based, as petitioner does in paragraph III of their petition because the "content" of the sign is relied upon to designate that the picketing is targeted, is absurd. Moreover, respondents did not rely exclusively on the signs as evidence of targeted picketing. The trial judge considered the prior conduct of the petitioners as well as the conduct in Warren before determining that the petitioners engaged in targeted picketing. Petitioner Lawson testified that upon learning that the Murrays no longer lived in Westfield, he stopped picketing there and he investigated property records to discover where they had moved. He notified the Warren police that he was coming to picket in Warren at Dr. Murray's residence. Within the year prior to the trial, petitioner Lawson's anti-abortion activities have been consumed with Dr. Murray.

Petitioners would have the Court operate under the fiction that this case began on November 19, 1995 and ignore the history between the parties. It is entirely appropriate and, in fact, necessary that the Court consider the history between the parties commencing on January 20, 1991. PA at 18a. With that background, any suggestion that the petitioners did not intend to engage in targeted picketing with the Murrays being the target belies logic and must be rejected. This specious position offered by petitioners has been rejected in *State of Arizona v. Baldwin*,

908 P.2d 483 (Ct. of App. Arizona 1995). In that case, the court upheld a residential picketing statute in the conviction of an abortion protester despite the defendant's claim that he was not engaged in "targeting picketing". Despite the protester's claim that he was not targeting the doctor because he walked the entire length of the street, the court found targeting on the basis of the protester's statement to the doctor that he "was going to hell for killing babies". Also of note in that court's decision is the discussion of the captive nature of the residential listener when faced with even an unobtrusive lone picketer. *Id.* at 488.

People v. Holman, 630 N.E. 2d 154 (Ill. App. Ct. 1994) does not compel a different result. In this Illinois case, defendant was arrested for violating the statute prohibiting residential picketing. The issue on appeal was whether evidence of prior picketing should be admitted at trial. The ruling that this evidence should be precluded as being extremely prejudicial in a criminal case does not support petitioners' argument that they were not engaged in targeted picketing in the context of this case.

Petitioners' feeble attempt to limit targeted picketing to focused picketing taking place solely in front of a particular residence is not supported by the caselaw despite their desperate reliance on Justice Scalia's dissent at 115 S. Ct. 264-65. Both the *Madsen* Court and the *Murray* Court rejected the narrow reading of *Frizby* espoused by petitioners herein which would permit a prohibition on picketing which occurred only directly in front of the target's residence. In *Madsen*, this Court ruled that while the record before it did not justify a 300 foot picket-free zone around the homes of staff members of a Florida health clinic, "It appear[ed] that a limitation on the time, duration of picketing, and a number of pickets *outside a smaller zone* could have accomplished the desired result." *Madsen*, 114 S. Ct. at 2530 (emphasis added). This Court plainly contemplates small

picket-free zones as permissible means of serving the state interest in residential privacy. The New Jersey courts did not err in creating such a zone. *Madsen* did not establish how large the smaller zones should be, leaving that task to trial judges to determine, based on the facts of the individual case, keeping in mind the new standard that the injunction should burden no more speech than necessary to serve the state's significant interests.

Despite petitioners' assertion that New Jersey is the only court that has not limited its definition of targeted picketing to maintaining a physical presence directly in front of a specific residence and nowhere else, the cases cited by petitioner are either consistent with the within ruling or distinguishable from it in a factual context.

The dissenting opinion of Judge Boyce F. Martin, Jr. in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995) provides a persuasive discussion of this issue.

> Thus, I believe that the picketers may be prevented from engaging in targeted picketing, even when their method of targeting includes slow marching, if their method of picketing continues to infringe on the privacy interests mentioned above, when, for example, the picketers create a situation where the target of the picket is a captive audience or whose residence is under siege. Merely because the plaintiffs chose to march slowly by other residences, as well as the targeted residence, does not insulate their activity from regulation. The targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still. The psychological injury and

> disturbance to the tranquility of the home are not reduced because the picketers are marching slowly.

Id. at 1111.

In *Vittitow*, anti-abortion picketers filed suit claiming a town ordinance that prohibited picketing "before or about" any residence was unconstitutional. The trial court issued an injunction that attempted to narrow the scope of the ordinance to the area in front of a targeted residence or "the two homes on either side" of the targeted residence. The Sixth Circuit stated that the narrowing injunction was unconstitutional because it created a no-picketing zone beyond the area "solely in front of a particular residence." 43 F.3d at 1105 (citing *Madsen*, 114 S. Ct. at 2530). Appellants claim this holding conflicts with the decision of the New Jersey Supreme Court creating a no-picketing buffer zone of 100 feet on either side of the Murrays' residence.

The *Vittitow* injunction, however, interprets a statute of general applicability, unlike the injunction in this case, which adjusts the rights of private parties based on the facts of an individual case. As the Sixth Circuit recognized,

> This is not a case where the target of the picketing has come to court seeking an injunction. In such a case, the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for. Here, however, an ordinance was at issue.

43 F.3d at 1107. An injunction interpreting an ordinance to place demonstrators two houses away from their target throughout an entire town will have varying effects on speech depending on the neighborhood where the picketing is taking

place. Such an injunction may well therefore burden more speech than necessary to serve the interests of residential privacy. It is such a "one-size-fits-all" injunction that the Sixth Circuit held to be beyond the scope of this Court's decisions in *Frisby v. Schultz*, 487 U.S. 474 (1988), and in *Madsen*. *Vittitow*, 43 F.3d at 1107.

In contrast, in this case "the target of the picketing has come to court seeking an injunction" and the court has "define[d] the rights of the parties in an appropriately worded injunction." 43 F.3d at 1107. That injunction, pursuant to the dictates of *Madsen*, has been crafted to burden no more speech than necessary, in light of the facts of the case, to serve the state's interest in residential privacy.

It is respectfully submitted that if *Vittitow* does interpret *Madsen* to forbid no-picketing zones larger than the frontage of a residence when private parties seek relief in a particular case, *Vittitow* is wrong.[1] The Supreme Court in *Madsen* struck an injunction providing a 300 foot no-picketing zone because it was "much larger" than the zone provided for in the ordinance approved in *Frisby* and it appeared that a smaller zone could have accomplished the desired result. 114 S. Ct. at 2530.

---

1. In like manner, to the extent that *Hanzo v. deParrie*, 152 Or. App. 525 (1998) and *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997) stand for this narrow interpretation, they are also inconsistent with *Madsen*. The factual settings in these two cases also distinguish them from the case under review. In *Hanzo*, the court was dealing with an anti-abortion appeal of a permanent civil Stalking Protection Order, SPO, obtained by an abortion provider. The court found that the "contacts" were insufficient to support the SPO. In *Lucero*, the court was faced with a blanket 200-foot buffer zone injunction that protected the residences of all the clinics' staff members. The ruling that this injunction was too broad has little relevance to the within injunction which protects one individual who has been the target of anti-abortion activity since 1992.

In like manner, the petitioners' reliance on *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996) is misplaced. The court in *Kirkeby* recognized that its decision was fact sensitive and cautioned against extending the ruling to other factual settings as it referred approvingly to *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) where it upheld a three house zone in a residential picketing case. *Douglas* involves a challenge by anti-abortion picketers to two ordinances enacted by the City of Clive, Iowa. The decision is particularly noteworthy in the instant review since the court grapples with the same cases that must determine the outcome of this case.

The *Douglas* court rejected the proposition that *Frisby* and *Madsen* allow an absolute ban on picketing only in the area directly in front of the targeted residence.

> We do not read *Frisby* as establishing a bright-line rule authorizing a limit on picketing only in the area directly in front of the targeted residence. The Court's concern in *Frisby* was not so much the size of the prohibited zone, but the impact the ban had on protected activity. The Court stressed that the ordinance applied to picketing "focused on" and "directed at" a particular residence. *Id.* at 482-83, 108 S. Ct. at 2501-02. The Court found residential picketing different from other forms of communicative activities, such as door-to-door solicitation and the distribution of handbills, because the targeted resident cannot avoid the picketers. The Court emphasized: "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485, 108 S. Ct. at 2503. Although the Court in *Madsen* repeated the language that *Frisby* prohibited only "focused picketing taking place solely in front of a particular residence," the Court considered an injunction, not an ordinance, and a 300-foot buffer zone, not an area covering the particular residence and the two adjacent houses . . .
>
> Obviously, there is a direct relationship between the size of the prohibited zone and the impact on protected speech. Nevertheless, we do not read *Frisby* as requiring us to strike down the ordinance as not narrowly tailored simply because the ordinance extends beyond the area solely in front of the targeted residence.

Id. at 1519-1520.

The Eighth Circuit upheld the ordinance recognizing that it preserved ample alternative channels of communication for the picketers.

It would appear that *Copper v. City of Fargo*, 905 F. Supp. 680 (D.N.D. 1994) is overruled by *Douglas* to the extent that it holds that an ordinance will only pass constitutional muster if it is construed to prohibit only focused picketing taking place solely in front of a particular residence. Therefore, appellants' reliance on that case herein is misdirected.

In like manner, the factual setting of *Planned Parenthood Ass'n v. Operation Rescue*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996) differs so from the instant case that its holding has little relevance herein. The expectation of privacy when residing in an apartment building cannot be compared to the tranquility sought by the Murrays when they moved to Warren, NJ. It is noteworthy, however, that in referring the matter back to the trial court to determine what is appropriate, the Court of Appeals suggested limitations regarding the number of picketers, the time of picketing and the days of picketing and also

suggested an advance notice requirement citing approvingly *Murray v. Lawson*. *Id.* at 743.

In similar fashion, petitioners' reliance on *City of Seven Hills v. Aryan Nations*, 667 N.E. 2d 942 (Ohio 1996) is misguided in view of the striking dissimilarities between the cases. That case involved an injunction against simultaneous picketing by a Jewish group engaged in residential picketing in front of the target whose conviction for Nazi war crimes had been reversed by the Israeli Supreme Court and by members of the KKK. The single issue addressed by the court was whether a permanent injunction prohibiting simultaneous picketing by groups with opposing viewpoints violated the Constitution. The findings in this content-based permanent injunction case are simply inapplicable to the case under review.

In *City of San Jose v. Superior Court of Santa Clara County*, 38 Cal. Rptr. 2d 205-212 (Ca. Ct. App. 6th Dist. 1995), the Court in a post-*Madsen* case approved a legislative judgment that

> . . . Picketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy for its occupants and instill identical feelings of captivity, fear and intimidation . . . as do picketers directly in front of the residence.

Petitioners' reliance on *City of Prairie Village v. Hogan*, 855 P.2d 949 (Kan. 1993) is understandable, but superficial. Defendant in that case was prosecuted under an ordinance that bans picketing "before or about a Church". Defendant carried anti-abortion signs on a three block route that included the Village Presbyterian Church. He chose that area to picket because of the probability of a high concentration of "Christians". The Supreme Court of Kansas narrowly interpreted the ordinance

to prohibit only focused picketing taking place solely in front of a particular Church. The court pointed out that the defendant was not protesting the Church, its teaching or its members and, therefore, concluded that he was not picketing a Church within the meaning of the ordinance. It is respectfully submitted that it does not follow by analogy that the petitioners herein are not engaged in focused picketing because they choose to walk beyond the Murray residence. In *City of Prairie Village*, the **Church** was not the target of the picketing while in the instant case, the **Murrays' residence** is the target of the picketing.

A post-*Madsen* case decided by the Texas Appellate Court is relevant and instructive as to the issues considered herein. In that matter, *Operation Rescue v. Planned Parenthood*, 937 S.W. 2d. 60 (Tex. App. - Houston [14th Dist.] 1996), Rehearing Overruled January 23, 1997, an action was brought by doctors who perform abortions and ten women's clinics. The trial judge initially entered a temporary restraining order establishing a 100-foot buffer zone of clinics and homes. The Texas Supreme Court ruled that this was not the "least restrictive" means to protect significant governmental interests and the matter was referred back to the trial court. Following a six week jury trial, a Judgment was entered awarding damages and permanently enjoining anti-abortion picket groups from demonstrating within a specific zone for each clinic ranging from 15 to 32 feet and, more importantly for our purposes, a 13-foot buffer zone was established from the property line of each physicians' residence. This residential buffer zone was discussed and upheld by the Appellate Court. *Id.* at 81 and 82. It is respectfully submitted that in similar fashion, the well-reasoned decision of Judge Diana, which erected a less restrictive zone of privacy than the Texas Court, should be upheld.

Petitioners' reliance on *Tompkins v. Cyr*, 1998 W.L. 21650 (N.D. Tex., January 7, 1998) is misguided. While the case did

involve an injunction against anti-abortion picketers, the decision is substantially devoted to an analysis of the 8.5 million dollar jury verdict against 11 abortion protesters on the basis of tort liability. What is significant for our purposes is the fact that the court held that focussed residential picketing is outrageous per se. at 15. In addition, the *Tompkins* court interpreted *Madsen* to approve the creation of a smaller "buffer zone" in a residential picketing case, at 22, as did the New Jersey Supreme Court in the original *Murray v. Lawson* and the lower courts in the *Murray* case presently under review. While it is true that the *Tompkins* court found that two of the picketers did not engage in "targeted picketing", it must be emphasized that the finding was made in the context of assessing tort liability, not an injunction. In addition, the finding was based on the absence of facts to establish targeted picketing as to those two individuals. In the instant case, the petitioners never attempted to establish separate defenses to a finding of targeted picketing. Moreover, the record established both individual and group conduct to warrant the finding.

Finally, while it is true that no buffer zone was erected by the *Tompkins* court, that ruling was based on the peculiar factual setting of the case wherein the plaintiff and his family had moved from the house where the picketing took place and they did not offer any evidence regarding the location or parameters of their current residence. at 22. In the instant case, the location and parameters of the Murray residence in Warren were carefully examined and a buffer zone was tailored so as to burden no more speech than is necessary to serve the Murrays' residential privacy, a significant government interest.[2]

Despite petitioners' colorful, barbed attacks on the restrictions crafted by the trial judge, it is quite apparent that

2. It is noteworthy that petitioners failed to address the fact that the *Tompkins* court limited the number of picketers, the duration of the picketing and the time of day of the demonstrations. *See* Point III below.

Judge Diana carefully reviewed this Court's analysis in *Madsen* and the New Jersey Supreme Court ruling in *Murray v. Lawson* which interprets that decision, and after careful consideration of the differences in the properties, crafted a new set of restrictions. In view of the greater setback in Warren, the Judge restricted the petitioners from picketing within the property line of the respondents. While this may place the picketers the same distance from the Murray home as the Westfield injunction, it deprives the respondents of the use of their front yard to a greater extent than the Westfield injunction. This specific tailoring of the buffer zone is yet further evidence that the injunction burdens no more speech than necessary to protect the Murrays' privacy and it should be upheld.

Finally, petitioners' provocative, yet unsupported statement that New Jersey courts discriminate against pro-life picketers must be addressed. Petitioners contrived this theory after a permanent injunction was entered and in reliance upon unpublished interim court proceedings in unrelated factual settings. Petitioners' effort to sully the impeccable record below is spurious and claims of discrimination against pro-life picketers should be rejected.

III.

THE TERMS OF THE PERMANENT INJUNCTION DO NOT BURDEN MORE SPEECH THAN IS NECESSARY.

Petitioners grossly exaggerate the impact of the limited buffer zone established by the trial judge in this case. In comparing the respondents' previous residence and neighborhood with the present setting, the trial judge reduced the buffer zone from an area within 100 feet of the property line of the Murrays' residence to an area coterminous with the

sidelines of the Murrays' residence.[3] Petitioners' concern that the Murray house cuts this lane in two and, thus, prevents picketing on both sides of the Murray residence can easily be cured by simply having half of the picketers on one side of the residence and half on the other side. As an alternative, one half of the time can be spent with all of the picketers on one side of the residence and one half of the time can be spent with all of the picketers on the other side. The minimal time spent driving around the block is not significant since petitioners admitted in testimony that they do not remain in the area for the entire designated hour.

Petitioners also argue that the requirement that they notify the police twenty-four hours in advance of a demonstration violates the First Amendment. This argument ignores the Supreme Court's holdings that even requirements for parade permits are permissible when the official's decisions on whether to grant or deny the permit are based on "narrow and definite" criteria that do not allow discriminatory administration because the official disagrees with the content of the speech. *Cox v. New Hampshire*, 312 U.S. 569 (1941). Such a permit system "giv[es] . . . public authorities notice in advance so as to afford opportunity for proper policing." *Id.* at 576. Here, of course, only notice is required; the police have no authority to prevent petitioners from picketing.[4]

Despite petitioners' reliance on *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), that case does not compel a different result herein. *Rosen* involved an ordinance that was enforced against

3. It is noteworthy that in Petitioners' prior petition to this Court, they stated, "Respondents' privacy interests are limited to the borders of their own property." Pet. Brf. at 28. It is fascinating how that espoused position changed once that precise position was adopted in a new setting.

4. Ironically, appellants have voluntarily notified the police prior to their demonstrations both before the New Jersey Supreme Court's ruling and in other residential picketing incidents.

an individual seeking to distribute literature at an airport as a member of "Jews for Jesus". While holding that the ordinance swept too wide in its regulation of the individual, the court distinguished this case from one it had earlier decided where an advance notice requirement was upheld in an injunction where the need for notice was demonstrated. Footnote 9 *Id.* at 1248.

In the instant case, Officer Kingsland explained in a convincing manner that it was necessary for the police department to be forewarned of the picketing activity so as to assure proper staffing. The trial judge found that testimony to be convincing and held,

> According to the testimony of Officer Kingsland, in order to ensure that there is adequate staffing available, the Warren Police needs proper notification of the demonstration. Therefore, the twenty-four hour requirement is necessary to protect public safety.

Relying on the New Jersey Supreme Court decision and the testimony presented, Judge Diana concluded,

> With regard to the limitation as to time and hours, again quoting from *Murray*, 138 N.J. at 235,
>
> > [f]urther, the picketing every two weeks limitation allows defendants to demonstrate often enough to communicate their message without subjecting the Murrays to a constant barrage of picketing [, and] the duration limitation gives defendants plenty of time in which to convey their message each time they picket.

It is respectfully submitted that the reasonable limitation as to number, time and hours together with the advance notice requirement permit petitioners a strong enough showing, consistent with the residential nature of the neighborhood and the Murrays' privacy, that their message does not seem marginalized. It is noteworthy that the trial judge in this action expanded the number of picketers that the New Jersey Supreme Court permitted in *Murray v. Lawson* from ten to fifteen in consideration of the differences in the neighborhoods. In short, the trial judge's careful consideration of the neighborhood and his tailoring of the time, place and manner restrictions should serve to completely thwart petitioners' attempts to revisit the restrictions imposed.

CONCLUSION

The New Jersey courts faithfully applied this Court's precedents to craft an injunction that burdens no more speech than necessary to serve the state's significant interest in protecting residential privacy. The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1790

In The

Supreme Court of the United States

October Term, 1997

MICHAEL LAWSON and EDIE TUCKER,

Petitioners,

v.

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

REPLY BRIEF

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ARGUMENT

In this case, the trial court granted (and the Appellate Division affirmed) an injunction restricting peaceful public expression – carrying signs while walking a route in front of an entire block of houses – without any tortious or otherwise unlawful conduct on the part of petitioners. Respondents concede that this is what happened, but defend the judgment below by repudiating any need to show "prior unlawful conduct" as a precondition for an injunction against expressive activity.[1] Opp. at 6. Not only is this proposition entirely at odds with the constitutional right to free speech, *e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994), but also it directly conflicts with decisions of the Supreme Courts of Texas and Ohio, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513-14 (Tex. 1993) ("There may be limits on residential picketing, . . . but it is not unlawful per se"); *City of Seven Hills v. Aryan Nations*, 667 N.E.2d 942, 947 (Ohio 1996).

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[1] In this regard, respondents merely repeat the position of the New Jersey courts which was first articulated in *Murray v. Lawson*, 642 A.2d 338 (N.J.), *vacated*, 513 U.S. 802 (1994), *modified*, 649 A.2d 1253 (N.J. 1994), *cert. denied*, 515 U.S. 1110 (1995). *See, e.g., Options v. Lawson*, 670 A.2d 1081, 1086 (N.J. App. Div. 1996) (reading *Murray* as a case "in which a residential picketing injunction . . . was sustained absent previous disorderly or unlawful conduct"); William A. Dreier & Paul A. Rowe, *Guidebook to Chancery Practice in New Jersey* 146 (4th ed. 1997) (reading *Murray* as allowing a permanent injunction against picketing "that does not violate any criminal laws and does not constitute a tort").

Citing *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), respondents insist that residential picketing is a method of expression that "inherently and offensively" interferes with residential privacy. Opp. at 6. Echoing the New Jersey courts (6a), respondents rip the *Frisby* quotation completely out of context, conveniently ignoring the fact that this Court was discussing targeted picketing taking place solely in front of a single residence and not residential picketing in general. Indeed, both *Frisby* and *Madsen* stand squarely for the proposition that "walking a route in front of an entire block of houses" is an expressive activity protected by the First Amendment. Engaging in this protected activity is simply not a valid basis for the issuance of an injunction.

Nevertheless, respondents argue that *Madsen* does not require a showing of "prior wrongful conduct" and "plainly contemplates small picket-free zones as permissible means of serving the state interest in residential privacy." Opp. at 8-9. They base this argument on the assertion that "no crime or tort had been committed by the demonstrators" in *Madsen* in relation to residential activities. *Id.* at 6. This assertion is simply wrong. The *Madsen* Court itself repeatedly stated that there had been "prior wrongful conduct," and the findings under review in *Madsen* made it clear that this misconduct (including focused picketing taking place solely in front of a single residence) had occurred in residential settings as well as commercial areas. *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 677-78 (Fla. 1993). Thus, *Madsen*'s suggestion that a "smaller zone" might be appropriate, 512 U.S. at 775, referred to a remedial injunction for specific misconduct; it was not an open invitation for the

automatic issuance of injunctions against peaceful picketing as well. A narrowly drawn prior restraint is still a prior restraint, even if it is carefully crafted by a conscientious judge after a trial and due consideration of the neighborhood and the competing interests of the parties.

In short, respondents' Brief in Opposition concedes that the injunction below is not remedial in nature, highlights a direct conflict of authority on the need for a showing of prior wrongful conduct, grossly distorts the meaning of *Frisby* and *Madsen*, and directly assaults the doctrine of prior restraints. The facts are admittedly undisputed and starkly present important constitutional issues that are hotly disputed. These are compelling reasons for granting the petition in this case; they underscore both the opportunity and the need for this Court to affirm and clarify the applicability of the doctrine of prior restraints to injunctions against residential picketing.

The same is true of the issue of content-neutrality. Respondents concede, as they must, that the New Jersey courts relied upon the message on the picketers' signs as a justification for the injunction. Opp. at 7. Nevertheless, respondents argue that the injunction is not content-based because the courts below did not rely "exclusively" upon sign content. *Id.* Aside from the obvious flaws of this argument (unconstitutional censorship becomes no less noxious when content is only "partially" relied upon), respondents' contention highlights a more fundamental flaw in the decision below.

The New Jersey courts, like respondents, erroneously concluded that all residential picketing is "targeted" –

and therefore subject to restriction – whenever a particular person is the subject (i.e., the "target") of the picketing. This completely confuses the analysis of this Court in *Frisby*. That decision upheld an *ordinance* banning "focused picketing taking place solely in front of a particular residence," 487 U.S. at 483. Equating the *physical* targeting in *Frisby* with the *topical* targeting in the present case is a gross misreading of *Frisby*. All residential picketing will have a topical target; "otherwise it is not really picketing." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir.), *cert. denied*, 515 U.S. 1121 (1995). The decision below thus conflicts directly with *Frisby*, *Vittitow*, and the numerous other courts that have properly read *Frisby* to concern only physical conduct (picketing solely in front of one house) and not the subject matter of the picketing. *See* Pet. at 16-17 n.6 (listing cases).

Respondents straightforwardly acknowledge the conflict among the lower courts, arguing that the many decisions contrary to the decision below are simply wrong. Opp. at 11 & n.1. Respondents have the law backwards, of course. In any event, they have clearly demonstrated a direct conflict of authority meriting this Court's review.

Furthermore, respondents suggest that the injunction was issued to protect them from feeling threatened by petitioners. Opp. at 3. However, the undisputed record shows that petitioners have been picketing for over six years in a completely peaceful and lawful manner; there is absolutely no factual justification for respondents' purported perception of a threat by petitioners. *See Hanzo v. deParrie*, 953 P.2d 1130, 1139-42 (Or. Ct. App. 1998) (in order to avoid intrusion upon free speech, a finding of threat can be made "only if [the] expression or other

associated conduct so unambiguously, unequivocally, and specifically communicated the . . . determination to cause harm that an objectively reasonable person . . . would fear for his or her personal safety"). *See also Keefe*, 402 U.S. at 419 ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

The constitutional right of free speech cannot be abridged merely because the audience may be upset by expressive activities. *E.g., United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971). Indeed, reliance upon audience reaction as a rationale for restricting speech renders the restriction content-based. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect' "). Thus, the injunction below is content-based because it is justified not only by reference to the content of the picketers' signs, but also by reference to respondents' self-serving claim that they feel intimidated by admittedly peaceful picketers.

Nor is there any merit to respondents' reliance upon the trial court's speculation that they would be "under

siege" in the absence of an injunction.[2] Opp. at 4. The undisputed record shows that petitioners have an unblemished six-year history of peaceful picketing in various residential neighborhoods, some of which are not covered by injunctions. The record is devoid of even a hint of a "siege" in any of these neighborhoods; petitioners have adhered strictly to their practice of walking a route in front of an entire block of houses, without lingering in front of any given house. Thus, there is no objective factual support for the suggestion that petitioners may misbehave in the absence of an injunction. Nor is it permissible under the First Amendment (not to mention the due process clause) to restrict picketing on the basis of predictions of future misconduct. *E.g., Seven Hills*, 667 N.E.2d at 947-48 ("avoiding a *potential* threat to public order through provocative speech is not a compelling government interest").

Respondents attempt to justify the requirement of 24 hours' advance notice on the ground that it is necessary to protect public safety by giving the police time to arrange for adequate staffing.[3] Opp. at 15. However, there

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[2] By relying on the potential for a future "siege," respondents implicitly concede that there is no past or present "siege." This confirms that there is no "captive audience" problem in this case. *See* Pet. at 7 & n.2.

[3] Respondents' reliance upon parade permit cases is frivolous. Advance notification is required for parades because the police need time to plan and execute the blocking of public streets and the altering of traffic patterns along the parade route. These considerations are simply not applicable to picketing on a public sidewalk or along the side of a public street.

is no factual basis in the record for concluding that *any* police presence is required during the picketing. It is undisputed that petitioners have picketed for over six years without any incident of violence, disorderly conduct or other problem requiring police intervention. This is true not only of demonstrations observed by the police, but also of demonstrations where no police were present. Therefore, advance notification burdens more speech than is necessary because it is not justified by any facts in this case. Moreover, New Jersey's public safety rationale is in direct conflict with a recent decision of the Supreme Court of Ohio. *Seven Hills*, 667 N.E.2d at 948 ("Because society should bear the expense of guaranteeing free speech no matter how offensive, the city's desire to reduce its burden in providing police resources is not a *compelling* government interest").

In sum, respondents' Brief in Opposition further demonstrates the doctrinal error and confusion that permeates the decision below. Respondents also concede and delineate the direct conflict of the decision below with numerous federal and state authorities. Because the error, confusion and conflict relate to important constitutional issues that are frequently litigated throughout the country, it is imperative that they be resolved by this Court. Otherwise, the fundamental right of free speech will remain at risk of suppression and constitutional doctrine will continue to erode. As conceded by respondents, the record in this case (which includes videotapes of the demonstrations) is clear, well-developed and remarkably undisputed. Accordingly, this case presents an outstanding vehicle for the intervention of this Court to address issues of national importance and to affirm and clarify

fundamental principles of First Amendment jurisprudence.

CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

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June 16, 1998

SUPREME COURT OF THE UNITED STATES

MICHAEL LAWSON AND EDIE TUCKER *v.* ELRICK MURRAY ET UX.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

No. 97–1790. Decided October 19, 1998

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, concurring.

This case approves a degree of restriction upon free speech that is unparalleled in the opinions of this Court. Petitioners have been enjoined from carrying signs with generalized anti-abortion messages, and signs identifying the respondent as an abortionist. The prohibition is absolute with respect to the public street along the 330-foot front property line of the 1.25 acre parcel occupied (with an 80 foot setback) by respondent's residence; but it also prevents sign-carrying beyond that zone (and "around" the Murray home), except for picketing by no more than 15 persons, no more than one hour every two weeks, and only if the police department is given twenty-four hours' notice. This silencing of speech on the public sidewalks has not been imposed to remedy any violence, disruption of traffic, or other tortious or unlawful activity that the petitioners have engaged in or threatened; no such activity has occurred.

This dispute is here for the third time. An injunction against similar picketing at respondents' former residence, affirmed by the New Jersey Supreme Court, was vacated and remanded for reconsideration in light of our decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994). See *Murray* v. *Lawson*, 624 A. 2d 338 (N. J. 1994), vacated, 513 U. S. 802 (1994). On remand the New Jersey Supreme Court revised the injunction, making it similar

to what the one here provides. *Murray* v. *Lawson*, 649 A. 2d 1253 (N. J. 1994). We denied certiorari in that case. 515 U. S. 1110 (1995). Subsequent to that decision, the Murrays moved, and sought a new injunction preventing picketing around their new residence. An injunction issued and was approved by the Appellate Division of the Superior Court of New Jersey; the Supreme Court of New Jersey declined a petition for certification.

Although I believe that what New Jersey has approved here makes a mockery of First Amendment law, I concur in the denial of certiorari for the same reasons I concurred the last time this dispute was here. See 515 U. S at 1110 (Scalia, J. concurring). First, the lower court's reliance on a so-called "captive audience" exception to the doctrine of prior restraints may make it difficult to reach the most significant question the case presents: whether prior restraint of speech may be imposed in absence of actual or threatened illegality. And second, experience suggests that seeking to bring the First Amendment to the assistance of abortion protesters is more likely to harm the former than help the latter.